

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award by the Assistant Director should be modified. The Appeals Board finds claimant had a temporary injury but suffered no permanent disability from the work-related injury.

Findings of Fact

1. On July 20, 1995, claimant injured his low back while performing duties as a carpenter for respondent's construction business.
2. Claimant was initially treated at the Minor Emergency Center and then continued to work with restrictions. Beginning September 25, 1995, claimant was off for a few weeks. He then returned to a different position and worked eight more weeks in a light-duty night watchman position before being laid off January 5, 1996.
3. From August 14, 1995, through October 12, 1995, claimant received treatment from Dr. Anthony G. A. Pollock, an orthopedic surgeon. Dr. Pollock did not testify but his records were introduced by stipulation of the parties. Dr. Pollock prescribed physical therapy and noted claimant felt some parts of the therapy were too hard. Dr. Pollock disagreed. Claimant also, according to Dr. Pollock, seemed convinced he had something very seriously wrong. Dr. Pollock diagnosed spondylolisthesis and disc disease, but no disc herniation. Dr. Pollock also noted claimant was making objections of one kind or another to even the most reasonable suggestions by the employer. Apparently not satisfied with Dr. Pollock, claimant asked for a second opinion.
4. Beginning in October 1995, claimant was treated by Dr. Robert L. Eyster. Dr. Eyster diagnosed Grade II spondylolisthesis. Dr. Eyster testified this condition was most likely a preexisting condition which did not occur at work. According to Dr. Eyster, claimant had improved when he saw him in December 1995 but in January 1996 made additional complaints. On the basis of those additional complaints, Dr. Eyster recommended restrictions. Dr. Eyster did not, however, believe the work injury caused any permanent functional impairment. He recommended the restrictions to keep reoccurrences and symptoms to a minimum. Specifically, he recommended claimant not lift over 25 pounds, not repetitively lift over 15 pounds, and not repetitively forward bend.
5. Dr. Lawrence R. Blaty saw claimant on February 13, 1996, at the request of claimant's attorney. He diagnosed a Grade I spondylolisthesis and chronic lumbosacral strain. He rated claimant's impairment as 10 percent of the body as a whole and attributed one-half of the rating to the strain and one-half to the spondylolisthesis. He agreed the spondylolisthesis did not occur at the time of the injury and was a longstanding problem. He also recommended restrictions to help avoid worsening. Claimant told him he was having constant aching and tightness with occasional sharp stabbing pains in the low back. Dr. Blaty recommended claimant avoid lifting or carrying over 25 pounds occasionally or 15 pounds frequently. He also recommended claimant limit to occasional bending or twisting with his lower back and that he avoid any lifting during these activities. Finally, he

recommended that claimant avoid sitting for greater than two hours at a time and that he be given the opportunity to move around and stretch his back.

6. Claimant testified at his unemployment hearing on March 6, 1996, that he was under no restrictions and was not experiencing pain or discomfort in his back.

7. Dr. Eyster testified that he recommended restrictions only because of claimant's complaints. Dr. Eyster agreed that if claimant told him he did not feel he needed restrictions, Dr. Eyster would not have recommended specific restrictions, only that claimant be careful.

8. Dr. Blaty testified that claimant's testimony at the unemployment hearing was different from what claimant told him on February 13, 1996. He stated that he probably would not recommend restrictions for an asymptomatic Grade I spondylolisthesis, especially if the individual is maintaining a job.

9. In 1994, claimant pled guilty to welfare fraud and was placed on probation. In 1995, the probation was revoked and then reinstated after a ten-day jail sentence.

10. Since being laid off January 5, 1996, claimant has worked only briefly, from February 13 to February 23, 1997, at Country Accents. While there, he earned \$5 per hour. His duties included cutting lumber to specific dimensions and he left this job because he felt it required more bending than he was capable of.

11. Mr. Richard W. Santner conducted a vocational assessment and provided job placement services for claimant. According to claimant, Mr. Santner was not able to find jobs for which he could apply. Claimant testified that he applied to approximately 20 places on his own.

12. Mr. Santner concluded claimant was not likely to go to work during the pendency of this claim because of claimant's concern about the effect going to work would have on the value of his workers compensation claim.

13. The Appeals Board concludes claimant does not have additional permanent impairment of function as a result of the accident and injury alleged here. This conclusion is based in part on the opinion of Dr. Eyster and in part on the Board's assessment of claimant's credibility.

14. The Board also finds claimant does not have additional restrictions as a result of the accident and injury alleged here. For a combination of reasons, the Board has concluded claimant's complaints should not be treated as fully credible. Those reasons include the prior conviction for welfare fraud. In addition, however, the evidence in this case reveals a consistent theme. First, Dr. Pollock's records suggest Dr. Pollock did not believe claimant was injured as badly as claimant believed and that claimant was not cooperating

well with efforts to return to work. Second, Dr. Eyster's testimony and records show that claimant was improving until he was laid off. Dr. Eyster's note of December 11, 1995, indicates claimant may return to work without restrictions. Claimant was then laid off January 5, 1996, and when Dr. Eyster saw claimant on January 11, 1996, the complaints had increased. Claimant then testified at the unemployment compensation proceeding on March 6, 1996, that he did not have restrictions and was not having significant pain or discomfort after advising Dr. Blaty otherwise. Claimant explained his testimony in the unemployment hearing by stating that he needed employment and needed money. Finally, Mr. Santner concluded claimant would not obtain work while the claim was pending because of claimant's concern about how this would impact his recovery on the claim. This combination of circumstances does not encourage the Board to give credence to claimant's complaints.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and must prove the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and tasks loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guidelines for the Evaluation of Physical Impairment*. K.S.A. 44-510e.

4. The Appeals Board concludes claimant has not met his burden of proving by a preponderance of credible evidence that he sustained permanent disability, either functional impairment or work disability, as a result of the accident and injury at issue in this case.

5. Claimant did sustain a temporary aggravation of his spondylolisthesis and is entitled to an award for the 7.71 weeks of temporary total disability benefits and the medical expenses previously paid.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery on October 16, 1997, should be, and hereby is, modified.

Claimant is awarded 7.71 weeks of temporary total disability benefits at the rate of \$229.52 per week for a total of \$1770.60, and medical expenses previously paid in the total amount of \$5,451.79. Claimant is not entitled to benefits for permanent disability and is not entitled to future medical treatment.

Claimant is entitled to unauthorized medical expense up to the statutory limit.

The Appeals Board approves and adopts the orders by the Assistant Director relating to attorney fees and court reporting expenses.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Wade A. Dorothy, Lenexa, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director